91-1554

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

ARCHDIOCESE OF PORTLAND IN OREGON and
DIOCESE OF BAKER, Petitioners,

v.

EMPLOYMENT DIVISION, STATE OF OREGON,
Pamela A. Mattson, Administrator,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

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February 21, 1992

QUESTION PRESENTED

Does the Establishment Clause of the First Amendment prohibit the State of Oregon from holding a church to be a subject "employer" under the Oregon Employment Division Law?

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EMPLOYMENT DIVISION, STATE OF OREGON,

Pamela A. Mattson, Administrator,

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PETITION FOR A WRIT OF CERTIORARI

TO THE OREGON COURT OF APPEALS

Petitioners, Archdiocese of Portland in Oregon and Diocese of Baker, pray that a writ of certiorari issue to

review the judgment of the Oregon Court of Appeals filed in the above-entitled proceeding on August 21, 1991.

OPINIONS BELOW

The opinion of the Oregon Court of Appeals is reported at 108 Or App. 495, 814 P.2d 566 (1991) and is reprinted in the appendix hereto. (App.1).

The Referee Decision of the Employment Division of the Oregon Department of Human Resources has not been reported. It is reprinted in the appendix hereto. (App.2).

JURISDICTION

The judgment of the Oregon Court of Appeals was filed August 21, 1991.

By its order dated November 26, 1991, the Oregon Supreme Court denied Petitioner's Petition for Review of the decision of the Oregon Court of Appeals (App.67-68), thereby making the judgment

of the Oregon Court of Appeals a final judgment of the highest court of the State of Oregon in which a decision could be had. As of the time this petition was drafted the judgment of the Oregon Court of Appeals had not been entered, however, all procedural conditions precedent to its entry under Rule 14.05(3) of the Oregon Rules of Appellate Procedure had been satisfied.

The jurisdiction of this Court is invoked under 28 USC Section 1257.

CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

U.S. Const. amend. I, cl. 1:

> Congress shall make no law respecting an establishment of religion . . . .

U.S. Const. amend. XIV, § 1, due process cl.:

> . . . nor shall any state deprive any person of life, liberty or property,

without due process of law;. . . .

26 USC § 3309(b)(1):

> This section shall not apply to service performed - (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

ORS 657.072(1)(a):

> 'Employment' does not include service performed:
>
> (a) In the employ of:
>
> (A) A church or convention or association of churches;
>
> (B) An organization which is operated primarily for religious purposes and which is operated,

supervised, controlled or principally supported by a church or convention or association of churches.

ORS 657.176(1) and (2): (Text reproduced in appendix hereto; App.71)

ORS 657.471(1) and (7)(a): (Text reproduced in appendix hereto; App.73)

STATEMENT OF THE CASE

Petitioner Archdiocese of Portland in Oregon ("Archdiocese") is the governing body of the Roman Catholic Church for that portion of Oregon lying West of the Cascade Divide and Petitioner Diocese of Baker ("Diocese") is the governing body of the Roman Catholic Church for that portion of Oregon lying east of the Cascade Divide. The primary purpose of Petitioners is to promote the Roman Catholic religion in their respective

jurisdictions.

Petitioners collectively operate 63 elementary and secondary schools through their local parishes and religious orders. Petitioners' elementary and secondary schools are operated primarily for religious purposes and have no separate legal existence apart from that of the Petitioners. The majority of the employes of the Archdiocese, and almost a majority of the employes of the Diocese, are employed in their respective schools. The balance of the Petitioners' employes are employed in a variety of administrative functions.

On March 31, 1986, the Employment Division of the Oregon Department of Human Resources ("Employment Division") issued a Notice of Determination finding the Archdiocese to be a subject "employer" under Oregon's Employment

Division Law, ORS Chapter 657. On May 9, 1986, the Employment Division issued a Notice of Determination finding the Diocese to be a subject "employer" under the Employment Division Law. Petitioners each timely made written requests for an administrative hearing upon those determinations in which Petitioners asserted that services performed in their employ were: a) exempt from the Employment Division Law by virtue of ORS 657.072(1)(a); and b) that holding Petitioners to be subject employers under that law by the State is prohibited by the Establishment Clause of the U.S. Constitution. (App.69).

A hearing was held May 22, 1987, before a referee of the Employment Division upon the Archdiocese's request. The Referee issued his decision on November 25, 1987 setting aside the

determination notice, finding that services performed in the Archdiocese's employ were indeed excluded from the Employment Division Law pursuant to ORS 657.072(1)(a). Having found in favor of the Archdiocese on its statutory claim of exemption the Referee did not reach the federal constitutional claim. (App.64-65).

The Employment Division appealed the Referee's decision to the Oregon Court of Appeals. The Archdiocese, in its brief on appeal, again asserted, inter alia, that the Establishment Clause prohibited the State from holding it to be a subject employer under the Employment Division Law. (App.70). While that appeal was pending, the Oregon Supreme Court rendered its decision in Emp. Div. v. Rogue Valley Youth for Christ, 307 Or 490, 770 P.2d

588 (1989), wherein it essentially invalidated ORS 657.072(1)(a) on state constitutional grounds holding that the statute impermissibly made an unequal grant of privilege between church-affiliated and non-affiliated religious organizations. The Oregon Court of Appeals, in light of the Rogue Valley decision, thereupon reversed and remanded the Archdiocese case to the Referee for reconsideration. (App.35).

On August 20, 1990, a consolidated hearing before a referee was held on the Notices of Determination regarding both the Archdiocese and Diocese. On October 16, 1990 the Referee issued his decision finding the Petitioners subject employers under the Employment Division Law and rejecting their federal constitutional claims. (App. 27 and 34). Petitioners appealed the Referee's

October 16, 1990 decision to the Oregon Court of Appeals, again asserting that holding them to be subject employers is prohibited by the Establishment Clause. (App.70-71). The Oregon Court of Appeals, by a per curiam opinion, affirmed the Referee's decision. (App.1). The Petitioners' subsequent petition for review to the Oregon Supreme Court was denied by an order dated November 26, 1991. (App.67-68).

In all state court proceedings below the Petitioners have consistently argued that to hold them to be subject employers will excessively entangle the State with the religious affairs of Petitioners due to the statutory scheme by which employes covered under the Employment Division Law are determined to be eligible for unemployment benefits, e.g., ORS 657.176(1) and (2),

and by virtue of the benefits charging provisions of the law, e.g., ORS 657.471.

The record below establishes that Petitioners have in the past discharged, and will continue in the future to discharge, those employes who fail to adhere to the teachings and doctrines of the Roman Catholic Church. When a church employe allegedly fails to satisfy such a condition of employment and is discharged as a result, there arises a question as to whether such a failure constitutes "misconduct" by the employe which, under the Employment Division Law, will control whether the employe will receive benefits chargeable to the church.

REASONS FOR GRANTING WRIT

The Decision Below Involves an Important Question of Federal

Constitutional Law Not Yet Settled by This Court.

In explaining the nature and import of the present case it is helpful to first describe its historical context.

The Employment Division Law, ORS Chapter 657, is Oregon's statutory companion to the Federal Unemployment Tax Act (FUTA), 26 USC § § 3301-3311. This Court has described FUTA as a "cooperative federal-state scheme to provide benefits to unemployed workers" created by Congress. California v. Grace Brethren Church, 457 U.S. 393, 398 (1982).

Services in the employ of a church have always been expressly excluded from mandatory state coverage under FUTA and, until the Rogue Valley decision, from the Employment Division Law. Title 26 USC § 3309(b)(1) has, since 1970,

excluded from mandatory state coverage "service performed (1) in the employ of (A) a church . . . ." ORS 657.072(1)(a) similarly provides that "'Employment' [for purposes of the Employment Division Law] does not include service performed: (a) In the employ of: (A) A church . . . ." ORS 657.072(1)(a) was directly patterned from § 3309(b)(1).

When Congress amended § 3309(b) in 1976 to eliminate an express provision which excluded services performed in the employ a school which is not an institution of higher education from mandatory state coverage it spawned a number of conflicting state [1] and federal decisions regarding whether

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[1]. One such decision was Emp. Div. v. Archdiocese of Portland, 42 Or App 421, 600 P.2d 926 (1979) wherein the Oregon Court of Appeals held that services performed in Petitioner Archdiocese's schools were excluded from coverage under ORS 657.072(1)(a).

Congress, by so doing, intended mandatory coverage for services performed in church-run or church-affiliated schools. In addressing that issue in St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981), this Court construed § 3309(b)(1) to exempt church-run schools from mandatory state coverage. 451 U.S. at 781-2.

The next term following its decision in St. Martin Lutheran this Court decided California v. Grace Brethren Church, 457 U.S. 393 (1982), wherein the issue was raised as to whether § 3309(b) and its California companion statutes violate the Free Exercise and Establishment Clauses of the First Amendment by requiring religious schools not affiliated with any church to pay unemployment insurance taxes. This Court did not decide those

constitutional issues in Grace Brethren, however, because it held that the trial court lacked subject matter jurisdiction and, accordingly, vacated the judgment below.

Shortly before this Court's decision in St. Martin Lutheran the Commonwealth Court of Pennsylvania had before it the question of whether Pennsylvania's state statutory equivalent to § 3309(b)(1) violated the religion clauses of the First Amendment by distinguishing between church-affiliated religious schools and those having no church affiliation. Finding such a distinction offensive to the Free Exercise Clause of the First Amendment, the Pennsylvania Court in that case severed the church-affiliation requirements from the pertinent statute, thereby broadening the exclusion beyond that allowed under

§ 3309(b). Christian School Ass'n. v. Com., Dept. of Labor, 55 Pa. Commw 555, 423 A.2d 1340 (1980).

In Salem College & Academy, Inc. v. Emp. Div., 298 Or 471, 695 P.2d 25 (1985), the Oregon Supreme Court addressed a similar constitutional challenge to the church-affiliation requirement found in ORS 657.072(a)(1) brought by a religious school found not to be church-affiliated. In that case the court held that such a distinction offended the Oregon Constitutional guarantees of equality of privileges among religious institutions, but chose not to severe the church-affiliation requirement as the Pennsylvania Court had done with Pennsylvania's statute, believing that to do so would put Oregon out of compliance with FUTA by broadening the exclusion beyond that

allowed under § 3309(b). The court reasoned in Salem College that any construction of the state statute which would conflict with FUTA's mandatory coverage provisions would be inconsistent with the Oregon Legislature's overriding intent in enacting ORS 657.072(a)(1) to comply with FUTA. To resolve the dilemma before it the court in Salem College interpreted Oregon's statute as not excluding from covered employment services performed in any religious school, whether church-run or otherwise. 298 Or at 495.

It was the Salem College decision in 1985 which caused the Notices of Determination to be issued to Petitioners in the present case. Initially, those notices were based only upon Petitioners' employes who were

employed in their schools.

In 1989 the Oregon Supreme Court, in Emp. Div. v. Rogue Valley Youth for Christ, 307 Or 490, 770 P.2d 588 (1989), addressed a constitutional challenge brought by the Employment Division to the statutory exclusions for services performed in the employ of a church or church-affiliated religious organization provided under ORS 657.072(a)(1). Relying upon Salem College and finding it impermissible under the Oregon Constitution to distinguish between religious organizations based on church-affiliation for purposes of assessing unemployment compensation taxes, the Oregon Supreme Court in Rogue Valley in effect invalidated ORS 657.072(a)(1). Ironically then, the clear language of § 3309(b)(1) which differentiates between church-affiliated and non-affiliated

religious organizations caused the court in Rogue Valley to decide that no state statutory exclusion could be allowed for services performed in the employ of any religious organization.

Every state, with the exceptions of Hawaii and New York, has in its unemployment compensation law an exclusion for services performed in the employ of a church or church-affiliated religious organization identical to that found in FUTA and the Employment Division Law. In light of the Rogue Valley decision the Oregon Legislature in 1989 enacted a new law granting exclusions from the Employment Division Law for services performed in the employ of all religious organizations and churches, to be operative only upon an amendment to FUTA which would "permit states to exempt all religious

organizations without jeopardizing the right of employers in this state to a full tax credit against the tax imposed by the Federal Unemployment Tax Act." Section 6, Chapter 897, Oregon Laws 1989. Although previously proposed in Congress, such amendment to FUTA has not yet been enacted.

Patterned to comply with FUTA, all state statutory schemes for providing and taxing unemployment benefits are substantially similar. Oregon's Employment Division Law, if applied to church employes, will cause governmental intrusion into the religious affairs of church employers through that law's eligibility and benefits charging scheme which requires the state to adjudicate, in disputed cases, the doctrinal justifications of a church in discharging an employe for cause.

Whether or not a church employer is to be charged, or the amount by which it is taxed, for state unemployment benefits is determined on a case-by-case basis subject to state investigation and adjudication. Such a determination process is essentially the same as that which this Court found imposed a significant risk of infringing the First Amendment if the National Labor Relations Act were held to grant the National Labor Relations Board jurisdiction over lay teachers of church-operated schools. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 503 (1979).

"We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions

that would follow." 440 US at 504. One of the "conflicts" this Court was referring to involved the resolution of charges of unfair labor practices filed against the religious schools in which the schools had responded that their actions were mandated by their religious creeds. This Court made the following observation in that regard:

"The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the schools' religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502.

The present case involves a federal-state taxing scheme much broader in its practical application than the National Labor Relations Act. Varying state court decisions regarding the constitutionality of exclusions allowed under § 3309(b) of FUTA are increasingly frustrating the uniformality of state coverage which FUTA was designed to promote and should be resolved by this Court.

CONCLUSION

Petition for certiorari should be granted. At issue is the application of a taxing scheme to all churches and religious organizations having even a nominal amount of employes working in the state of Oregon. At the heart of that issue is a First Amendment question involving church-state relations which, by virtue of FUTA, is common to all

states.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of
the Notices of Determination of
Archdiocese of Portland and
Diocese of Baker.
ARCHDIOCESE OF PORTLAND
IN OREGON,
Diocese of Baker in Oregon,
Petitioners,
v.
EMPLOYMENT DIVISION,
Respondent.
(86-T-0081, 86-T-0111;
CA A67153 (Control), A67166)

Filed: August 21, 1991

Before Joseph, Chief Judge, and Riggs and Edmonds, Judges.

PER CURIAM

Affirmed. Employment Div. v. Rogue

Valley Youth for Christ, 307 Or 490, 770 P2d 588 (1989); Salem College & Academy, Inc. v. Emp. Div., 298 Or 471, 487 n 12, 695 P2d 25 (1985).

DECISION OF THE REFEREE

OF THE EMPLOYMENT DIVISION

OF THE OREGON DEPARTMENT

OF HUMAN RESOURCES

ARCHDIOCESE OF PORTLAND

CASE NO. 86-T-0081 B

FIRM NO. 556800

DIOCESE OF BAKER

CASE NO. 86-T-0111 A

FIRM NO. 556047

ST. MARYS HIGH SCHOOL MEDFORD, OREGON

CASE NO. 86-T-0129 A

FIRM NO. 556054

ST. MARYS OF THE VALLEY HIGH SCHOOL

CASE NO. 86-T-0173 A

FIRM NO. 556854

Before R.H. Heinichen,

Employment Division Referee

Date Mailed: October 16, 1990

Notices of Determination were served on the above-named applicants. These Notices were issued under provisions of ORS 657.485, ORS 657.679 and ORS 657.683(1). Timely requests for hearings were filed in regard to all applicants.

A hearing was initially held by a referee of the Employment Division concerning the Archdiocese of Portland. The referee issued a referee decision on November 25, 1987. That decision held the applicant was not an employer subject to Employment Division Law upon a determination the services being performed were exempt from coverage under provisions of ORS 657.072(1)(a).

That referee decision was appealed to the Oregon Court of Appeals. On May 2,

1990, the Court of Appeals reversed and remanded the matter for reconsideration in light of Employment Division v. Rogue Valley Youth for Christ, 307 Or 490, 770 P2d 588 (1989).

The applicants petitioned to offer further argument and evidence. A consolidated hearing was held on August 20, 1990 in Portland [sic] Oregon. These matters were consolidated under OAR 471-40-015(5) as the issues were [sic] same and it would neither unduly complicate these issues nor jeopardize the rights of the parties. Representing the applicants was Eugene E. Feltz, attorney, who was accompanied by several individuals. M. Harbur, Assistant Attorney General, represented the Employment Division and she was accompanied by one individual.

The parties agreed to stipulated

facts. The applicants offered additional evidence and further arguments were taken.

The parties also agreed that the Notices of Determination issued to St. Marys of the Valley High School and St. Marys High School of Medford, Oregon, were issued in error. These two schools should have been listed under the Archdiocese of Portland. Neither party had any objection to the referee setting these Notices of Determination aside as they were issued to the wrong employers. Since the notices are set aside, the requests for hearing concerning them are dismissed.

The parties also agreed on a more specific statement of the issues.

Issue and Law: (A) Whether the applicants are "employers" as defined in ORS 657.025.

(B) Whether the services for remuneration performed for the applicants constituted taxable employment under ORS 657.030, or are excludable under other provisions of ORS Chapter 657.

(C) If the applicants are subject to coverage under Oregon Employment Division Law as employers, on what date does this coverage start.

Findings of Fact: The parties agreed to the following stipulated findings of fact which the referee, after modification, adopts.

(1) At all times herein mentioned the Archdiocese of Portland in Oregon (the Archdiocese) and the Diocese of Baker (the Diocese) were and are now non-profit, religious corporations, created and existing under the laws of Oregon for religious, educational,

benevolent and charitable purposes. The Archdiocese and Diocese (applicants) are organizations described in section 501(c)(3) of the United States Internal Revenue Code which are exempt from income tax under section 501(1) of the Internal Revenue Code.

(2) On November 13, 1985, the Employment Division mailed to the applicants a letter informing them of the decision in the case of Salem College and Academy, Inc., v. Employment Division, 289 Or 471, 695 P2d 25 (1985). The letter stated that they would have to register as employers.

(3) On November 27, 1985, the applicants mailed letters to the Employment Division objecting to the determination that they were employers and requesting hearings.

(4) Notices of Determination were

sent out to the applicants finding they were subject employers as of April 26, 1985.

(5) The applicants filed timely requests for a hearing.

(6) The applicants are part of the Roman Catholic Church headquartered in Vatican City, Italy. The Archdiocese is the governing body of the Roman Catholic Church in the western part of Oregon (that part of Oregon extending west of the Cascade Mountain Range). The Diocese is the governing body of the Roman Catholic Church in the eastern part of Oregon (that part of Oregon extending east of the Cascade Mountain Range). These geographical areas are further divided into local parishes.

(7) The primary purpose of the applicants is to promote and spread the Roman Catholic Religion in their

respective parts of Oregon. The general purposes of the applicants include the following: to establish and conduct schools, seminaries and colleges; and to carry on benevolent, charitable, religious and missionary work of the Roman Catholic Church in their respective parts of Oregon.

(8) The Archdiocese is headed by an archbishop and the Diocese is headed by a bishop. These individuals are appointed by the spiritual leader of the Roman Catholic Church, the Pope.

(9) The applicants are made up of local parishes. Each parish consists of a Roman Catholic Church and its members. Each church is organized as a congregation and conducts regular public worship services.

(10) The applicants operate elementary and secondary schools through

their local parishes and religious orders.

(11) The elementary and secondary schools operated by the applicants are a part of the Archdiocese and Diocese respectfully. They are operated primarily for religious purposes and these schools have no separate legal existence apart from that of the applicants. In addition to the usual subjects taught in public elementary and secondary schools, the curricula of the applicants' schools include a period of at least 30 minutes each day for the teaching of Catholicism. Further, it is the policy of the applicants that the doctrines of the Catholic Church be emphasized wherever feasible throughout the curricula of its schools.

(12) The applicants employ teachers, administrators and other individuals in

the operation of their schools. During the calendar year of 1985, each of the applicants employed one or more individuals in their schools in each of 18 separate weeks, and the total payroll of each during the second calendar quarter of 1985 amounted to $225 or more.

(13) From time to time prior to April 1985, and from time to time since April 1985, employees of the applicants have been separated from their employment for reasons specifically related to the teachings or doctrines of the Roman Catholic Church. The actual number of such separations from employment is unknown as no record has been kept by the applicants with respect thereto.

(14) From time to time prior to April 1985, and from time to time since

April 1985, employees of the applicants have been separated from their employment for reasons wholly unrelated to the teachings or doctrines of the Roman Catholic Church. The actual number of separations is unknown as no record has been kept by the applicants with respect thereto.

(15) If the applicants are determined to be employers, the Employment Division may on occasion be compelled to inquire into the doctrines of the Roman Catholic Church and issue orders in contested cases relative to whether separations related to the teachings or doctrines of the Roman Catholic Church are of such a nature as to qualify an individual for unemployment insurance benefits.

(16) Each year from 1976 through 1986, the Internal Revenue Service of

the Department of Treasury has notified the United States Catholic Conference, Washington, D.C., (of which the applicants are members) that the agencies and instrumentalities and all educational, charitable and religious institutions operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States appearing in the official Catholic Director are not liable for tax under the Federal Unemployment Tax Act (FUTA). The applicants appear in said Directory.

(17) In the event the applicants are held liable to be employers subject to the Oregon Employment Division Law, they may elect to make reimbursement payments into the Unemployment Compensation Trust Fund in an amount equivalent to the amount of regular benefits and one-half

of extended benefits paid out to claimants who, during the applicable base period, were paid wages by the Applicants. The total annual wages paid by the applicants to employees of each of their elementary schools averages between $150,000 and $175,000.

(18) Each year, on the average, about two employees per school are separated from the applicants' employment.

(19) The average salary paid to each employee is approximately $14,000.

(20) In the event the State of Oregon is determined to be out of conformity with the requirements of 26 USC 3301, et sec., [sic] the State of Oregon will lose $30 to $40 million annually in administrative funds withheld by the federal government. In addition, each and every employer in the

State of Oregon will lose their federally allowed credit for payment of state unemployment taxes. Without such a credit, Oregon employers will pay an estimated $300 million in additional taxes to the federal government, pursuant to the Federal Unemployment Tax Act.

(21) The Employment Division has determined that services performed prior to July 1, 1989 in the employ of a church, convention or association of churches, or an organization which is operated, supervised, controlled or principally supported by a church or convention or association of churches, shall not constitute nor be treated as "employment" within the meaning of that term in the Employment Division Law unless such services were performed in connection with the operation of a

school. An exception to this statement is when it is necessary on an individual basis, to obtain wage credits earned prior to July 1, 1989 to establish unemployment insurance claims filed after July 1, 1989. The Employment Division has determined that services performed in connection with the operation of a school shall constitute or be treated as "employment" if rendered on or after April 26, 1985.

The following findings of fact were based on evidence presented at the hearing on August 20, 1990.

(22) the Archdiocese is aware of at least five separations occurring since 1987 which involved reasons specifically related to the teachings or doctrines of the Roman Catholic Church. It was believed that two of these individuals filed claims for benefits, but it was

not known whether benefits were allowed, or what reasons were given for the separations.

(23) The majority of the employees of the Archdiocese and almost a majority of the Diocese employees are employed in their schools.

Conclusion and Reasons: (A and B) AS TO WHETHER THE APPLICANTS ARE EMPLOYERS AND DO THE SERVICES PERFORMED CONSTITUTE EMPLOYMENT UNDER EMPLOYMENT DIVISION LAW.

An "employer" as defined in ORS 657.025 means: "any employing unit which employs one or more individuals in an employment subject to this chapter in each of 18 separate weeks during any calendar year, or in which its total payroll during any calendar quarter amounts to $225 or more."

As noted, each of the applicants

employed one or more individuals in their schools in each of 18 separate weeks and each applicants total payroll during the second calendar quarter of 1985 amounted to $225 or more. Therefore, applicants are "employers" within the meaning of the Employment Division Law as of April 26, 1985, unless the services of the individuals working for them are to be exempt from Employment Division Law under an exclusionary provision.

The Employment Division Referee originally held that the schools were "an integral and inseparable arm of the Roman Catholic Church." As such, the services performed in the applicants' schools were actually services performed for a church. Therefore, the services were exempt from coverage under provisions of ORS 657.072(1)(a)(A).

Subsequently, the Oregon Supreme Court issued its decision in Rogue Valley which specifically held that ORS 657.072(1)(a) violated the Oregon Constitution, Article I, Section 3. All religious organizations were then ruled to be subject to coverage under Employment Division Law. Thus, the basis for the referee's exemption was removed.

The applicants make two basic arguments as to why the exemption still exists. The first argument is that the Supreme Court wrongly decided Rogue Valley. Thus, the exemption under provisions of ORS 657.072(1)(a)(A) still is valid. The second argument is that including such organizations as the applicants under Employment Division Law amounts to a violation of the U.S. Constitution's First Amendment and a

violation of the Oregon Constitution concerning separation of the church and state. By making the applicants and like employers subject to Employment Division Law, there is excessive government entanglement with religion.

The applicants also argue, that if they are subject to coverage under Employment Division Law, it is a violation of their constitutional rights under the Equal Protection Clause because they have to cover church employees from April 26, 1985 while other churches only have to cover their employees from July 1, 1989. The applicants also raise an argument that Rogue Valley did not completely resolve the question of an exclusion existing under ORS 657.072(1)(a) for the period prior to its publication. Therefore, that exclusion still exists up to the

time chosen by the Employment Division to enforce the ruling of the court in Rogue Valley.

The applicants recognize that the court's decision in Rogue Valley is binding on the referee and he has no authority to question its validity. Their argument was made to protect their rights on appeal and that is recognized.

The applicants argue that subjecting them to Employment Division Law is a violation of Amendment I to the U.S. Constitution. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The applicants argue that such action violates the Establishment of Religion Clause. Their argument centers around the point that the Oregon Supreme Court, in discussing the "government's

excessive entanglement" in the Salem College case, looked at the effect of subjecting such employers to Employment Division Law coverage in light of the Free Exercise Clause and not under the Establishment of Religion Clause. The argument is that instead of a balancing test, a more stringent test should be used. That test basically is if the effect of the government action would lead in any manner to the state's involvement with religious activities, the action should not be allowed to continue. This perhaps is an oversimplification of the argument presented, but it sums up the position of the applicants.

The applicants offer the test set out in Lemon v. Kurtsman, 403 US 602, 91 SCt 2105, 29 LEd2d 745 (1971). The test, to borrow from the applicants' brief,

consists of three points: (1) reflect a clearly secular legislative purpose; (2) have a primary, as opposed to incidental, effect which neither advances nor inhibits religion; and (3) avoid excessive governmental entanglement with religion. The only point at issue is the third. The applicants argue that such excessive entanglement is already present.

The applicants point out that the U.S. Supreme Court found such a significant risk of entanglement under circumstances very similar to those at issue in this case in NLRB v. Catholic Bishop of Chicago, 440 US 490, 99 SCt 1313, 59 LEd2d 533 (1979). It is significant that the Oregon Supreme Court noted that case in Salem College and did not see that it affected its decision. The court in Salem College

specifically spoke to this point. It noted that the applicant in Salem College was concerned that it would not maintain the doctrinal standards required of its employees and discharge an employee for failing to meet those standards without opening its doctrine and faith to Employment Division scrutiny in protracted and expensive contests over unemployment benefits administrative determinations that would "entangle" the state in religion. The court pointed out "(T)his eventually can adequately be dealt with if and when it happens; we have no reason to believe that discharges of school employees over matters of religious doctrine are so frequent as to require the employer's entire exemption from the unemployment compensation system on that account." There was evidence presented that the

Archdiocese itself had on five occasions in the past three years terminated educational employees for violations based on religious differences and questions concerning doctrine. Two of these individuals probably applied for unemployment insurance benefits.

The Archdiocese has approximately 120 people leave its employment each year. The Diocese has approximately 12 people leave its employment each year. This is based on indications that approximately two persons per school are separated each year. Five separations in the last three years for doctrinal violations does not demonstrate that such problems will occur with great frequency, considering the number of people leaving the employment of the applicants. It is also noted that it was not clear whether any of these individuals were allowed

benefits, or if they were, whether it was for the feared reasons. The applicants have not established that a real problem has occurred in this area. Such problems may occur in the future in either a benefit or tax case. As the court stated, these problems could then be addressed.

In addition, the state agreed, as shown in Finding of Fact (15), there may be occasions where questions may be asked by Employment Division representatives of the applicants in contested cases relative to whether separations related to the teachings or doctrines of the Roman Catholic Church are of such a nature as to qualify an individual for unemployment insurance benefits.

The Archdiocese may have had some people apply for unemployment

compensation after being separated for doctrinal reasons. It was not shown what, if any, inquiries were made about these separations by representatives of the Employment Division. Neither was it shown that such inquiries, if made, brought into question any doctrinal issues. No excessive government entanglement with religion in the area of Employment Division Law has been shown as of yet. The applicants have failed to establish that including them under Employment Division Law violates Amendment I of the U.S. Constitution or the Oregon Constitution concerning the separation of Church and State.

The applicants' final argument centers around the date their coverage under Employment Division Law should start. It is pointed out that the Employment Division identified different

groups of church employees and selected different times as to when each group would be covered. The Employment Division divided church employees into those employed in religious or church schools and those that [sic] were employed directly in church work and not involved in the schools.

In the initial referee decision, a third group of church or religious employees was identified. These were employees of schools which were such "an integral and inseparable arm" of the church that the schools and the churches were the same. This, in effect, moved these employees from being school employees to employes of the church and treated them the same as other church employees.

Salem College raises a serious question as to whether this third

grouping was really correct. In that case, the court set out that:

> "The legislature could not constitutionally exclude from unemployment compensation coverage religious schools and their employees if they are controlled or principally supported by organizations described as 'churches' and extend coverage to otherwise similar religious schools operated by religious organizations that are not 'churches'. * * * [I]t (ORS 657.072(1)(a)) did not exempt all religious schools and their employees from unemployment compensation coverage."

With this premise, it is hard to envision that the court meant to exclude the schools which are the subject of this matter. It is true that the

applicant in Salem College was not directly connected to any "church". Even so, the court's statement is clear that all religious schools would be covered under Employment Division Law. It was not indicated that any group of school employees would be excluded because the schools were tied directly to a church. Therefore, the school employees of the applicants, while employed by the applicants, are still a separate group from church employees, and are to be treated as such.

Supporting this point, it is noted that the applicant was able to identify its school employees. The buildings where these individuals perform their duties are also identified. It is clear that these schools exist as a separate physical activity from the other religious activities of the applicants.

The schools do meet one of the aims and the purposes for the existence of the applicants. The schools are an integral part of their program. However, it is still a separate part, clearly identifiable and having an educational purpose besides a religious one. Welding these schools to the church to make them inseparable from the church defeats the concept set out by the court in Salem College.

The applicants argue that they are being discriminated against because other churches do not have their church employees covered until July 1, 1989 while their church employees are covered as of April 26, 1985. The applicants' church employees are not being covered prior to July 1, 1989. The only action taken concerning those employees is on an individual basis on claims filed

after July 1, 1989. All other religious school employees in Oregon are being covered as of the same date as are the school employees of the applicants. The action of the Employment Division or of the State of Oregon is not seen as an attempt to kill off the school system of the applicants.

It is understood that the applicants have a very extensive school system, which is greater than that of other religious organizations. The establishment of such a school system is a primary purpose of the applicants. Along with attempting to meet such goals come incidental expenses. Providing for protection for its past employees if they are separated for nondisqualifying reasons is one of those expenses accompanying such undertakings. To not provide such coverage, while other

school employees for other organizations have such coverage, is more discriminatory in nature, than not having such coverage afforded to the applicants' school employees. Being bigger does not automatically establish a protected class. It is not discriminatory that the applicants' school employees are covered as of April 26, 1985.

DECISION

(A) The Notices of Determination issued to St. Marys of the Valley High School and St. Marys High School in Medford Oregon are set aside. The requests for hearings concerning those Notices of Determinations are dismissed. These two entities are to be listed under the Archdiocese of Portland in Oregon.

The other Notices of Determination

establishing that the Archdiocese and the Diocese are employers subject to Employment Division Law are affirmed.

(B) The services performed by the school employees of the applicants are not excluded from coverage under Employment Division.

(C) The applicants are employers subject to Employment Division Law as of April 26, 1985.

/s/ _____

R.H. Heinichen

Referee

OPINION OF THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the

Tax Deficiency Assessment of

Archdiocese of Portland in Oregon.

EMPLOYMENT DIVISION,

DEPARTMENT OF HUMAN RESOURCES,

Petitioner,

v.

ARCHDIOCESE OF PORTLAND

IN OREGON,

Respondent.

(86-T-081; CA A46816)

Entered: August 3, 1990

Before Graber, Presiding Judge, and Joseph, Chief Judge, and Edmonds, Judge.

PER CURIAM

Reversed and remanded for reconsideration. Employment Div. v. Rogue Valley Youth for Christ, 307 Or 490, 770 P2d 588 (1989); see also Employment Div. v. Bible Temple, 101 Or App 497, 790 P2d 561 (1990).

DECISION OF THE REFEREE OF

THE EMPLOYMENT DIVISION OF THE

OREGON DEPARTMENT OF HUMAN RESOURCES

ARCHDIOCESE OF PORTLAND IN OREGON

CASE NO. 86-T-081

FIRM NO. 556800

Before Glen E. Seidler, Employment Division Referee

Date Mailed: November 25, 1987

A Notice of Determination, issued by an authorized representative of the assistant director of the Employment Division, was served on the above-named applicant on March 31, 1986, under the provisions of ORS 657.485, 657.679 and 657.683(1). The applicant requested a hearing on April 7, 1986.

A hearing was held before the undersigned referee of the Employment Division on May 22, 1987, in Salem, Oregon. Participating by telephone were Eugene E. Feltz, attorney, for applicant, and Renee Bryant Mason, Assistant Attorney General, representing the Employment Division.

Pursuant to leave requested of the

referee, Hearing Memorandum of the parties were filed June 11 and July 1, 1987, and a Reply Memorandum of the applicant was filed July 10, 1987.

ISSUE AND LAW: Whether the applicant is an "employer" as defined under ORS 657.025.

At the outset of the hearing, the parties submitted a stipulation entered into on May 21, 1987, agreeing to the following 19 facts which the referee hereby adopts.

Referee's Findings of Fact: (1) At all times herein mentioned Archdiocese of Portland in Oregon (the Archdiocese) was and now is a non-profit (religious) corporation, created and existing under the laws of Oregon for religious, educational, benevolent and charitable purposes. The Archdiocese is an organization described in Section

501(c)(3) of the United States Internal Revenue Code which is exempt from income tax under Section 501(1) of the Internal Revenue Code.

(2) On November 13, 1985, the Employment Division mailed to the Archdiocese a letter informing it of the decision in the case of Salem College and Academy, Inc., v. Employment Division, 298 OR 471.695 P2d 25 (1985). The letter stated that the Archdiocese would have to register as an employer.

(3) On November 27, 1985, the Archdiocese mailed a letter to the Employment Division objecting to the determination that it was an employer and requesting the hearing.

(4) On March 18, 1986, the Archdiocese completed and filed a Combined Employer's Registration Report "contingent upon the ultimate

determination that Catholic schools operated by the Archdiocese of Portland in Oregon are covered by Oregon Employment Division Law."

(5) On March 31, 1986, the Employment Division issued a Notice of Determination finding the Archdiocese to be a subject employer as of April 26, 1985.

(6) On April 7, 1986, the Archdiocese made a timely request for hearing in writing. This matter arises out of that request for hearing.

(7) The Archdiocese is a part of the Roman Catholic Church headquartered in Vatican City, Italy. The Archdiocese is the governing body of the Roman Catholic Church in the western part of Oregon (that part of Oregon extending west of the Cascade Mountain Range). Said geographical area is further divided

into local parishes.

(8) The primary purpose of the Archdiocese is to promote and spread the Roman Catholic religion in the west part of Oregon. The general purposes of the Archdiocese include the following: to establish and conduct schools, seminaries and colleges, and to carry on benevolent, charitable, religious and missionary work of the Roman Catholic Church in the western part of Oregon.

(9) The Archdiocese is controlled by an archbishop who is appointed by the spiritual leader of the Roman Catholic Church, the Pope.

(10) The Archdiocese is made up of local parishes. Each parish consists of a Roman Catholic Church and its members. Each church is organized as a congregation and conducts regular public worship services.

(11) The Archdiocese operates elementary and secondary schools through its local parishes and religious orders.

(12) The elementary and secondary schools of the Archdiocese are a part of the Archdiocese, operated primarily for religious purposes and these schools have no separate legal existence apart from the Archdiocese. In addition to the usual subjects taught in public elementary and secondary schools, the curricula of the Archdiocesan schools include a period of at least 30 minutes each day for the teaching of Catholicism. Further, it is the policy of the Archdiocese that the doctrines of the Catholic Church be emphasized wherever feasible throughout the entire curricula of its schools.

(13) The Archdiocese employs teachers, administrators and other

individuals in the operation of its schools. During the calendar year 1985, the Archdiocese employed one or more individuals in its schools in each of 18 separate weeks, and its total payroll during the first [second] calendar quarter of 1985 amounted to $225 or more.

(14) From time to time prior to April 1985, and from time to time since April 1985, employes of the Archdiocese have been separated from their employment for reasons specifically related to the teachings or doctrines of the Roman Catholic Church. The actual number of such separations from employment is unknown as no record has been kept by the Archdiocese with respect thereto.

(15) From time to time, prior to 1985, and from time to time since April

1985, employes of the Archdiocese have been separated from their employment for reasons wholly unrelated to the teachings or doctrines of the Roman Catholic Church. The actual number of separations from employment is unknown as no record has been kept by the Archdiocese with respect thereto.

(16) If the Archdiocese is determined to be an employer, the Employment Division may on occasion be compelled to inquire into the doctrines of the Roman Catholic Church and issue orders in contested cases relative to whether separations related to the teachings or doctrines of the Roman Catholic Church are of such a nature as to qualify an individual for unemployment benefits.

(17) Each year from 1976 through 1986, the Internal Revenue Service of

the Department of Treasury has notified the United States Catholic Conference, Washington, D.C., (of which the Archdiocese is a member) that the agencies and instrumentalities and all educational, charitable and religious institutions operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States appearing in the official Catholic Directory are not liable for tax under the Federal Unemployment Tax Act (FUTA). The Archdiocese appears in said Directory.

(18) In the event the Archdiocese is held to be an employer subject to the Oregon Employment Division Law, it may elect to make reimbursement payments into the Unemployment Compensation Trust Fund in an amount equivalent to the amount of regular benefits and one-half

of extended benefits paid out to claimants who, during the applicable base period, were paid wages by it. The total annual wages paid by the Archdiocese to employes of each of the elementary schools of the Archdiocese is approximately $175,000. Each year on the average, about two employes per school are separated from their employment with the Archdiocese. The average salary paid to each employe is approximately $14,000.

(19) In the event the State of Oregon is determined to be out of conformity with the requirements of 26 USC 3301, et seq., the State of Oregon will lose $30 to $40 million annually in administrative funds withheld by the federal government. In addition, each and every employer in the State of Oregon will lose their federally allowed

credit for payment of state unemployment taxes. Without such a credit, Oregon employers will pay an estimated $300 million in additional taxes to the federal government, pursuant to the Federal Unemployment Tax Act.

CONCLUSION AND REASONS: Applicant is not an "employer" as defined in ORS 657.025.

An "employer" as defined in ORS 657.025 means: "any employing unit which employs one or more individuals in an employment subject to this chapter in each of 18 separate weeks during any calendar year, or in which its total payroll during any calendar quarter amounts to $225 or more."

As found herein, applicant employed one or more individuals in its schools in each of 18 separate weeks and its total payroll during the second calendar

quarter of 1985 amounted to $225.00 or more. Therefore, applicant is an "employer", within the meaning of the Employment Division law as of April 26, 1985, unless the services of the individuals performed therefor are to be exempt therefrom under one of the exclusionary provisions thereof.

Applicant relies upon ORS 657.072(1)(a)(A) for such exemption.

In addition, applicant contends the Employment Division should be estopped from pursuing this matter based upon the doctrine of res judicata as the issue has already been decided by previous litigation and it should be barred from further asserting subjectivity of applicant to the law under the doctrine of collateral estoppel. A referee decision was entered in Archdiocese of Portland in Oregon v. Raymond P. Thorne,

in Case No. 78-T-62, RD 79-3 (1979) in which the facts were not materially different from those in the instant matter; nor has the statute been amended since that decision. The referee decision found the religious schools operated by the Archdiocese to be a "church" within the meaning of ORS 657.072(1)(a)(A) and OAR 471-31-090(1)(a). The decision further found that services for the Archdiocese were also exempt under the provisions of (1)(a)(B) of ORS 657.072: "there is no doubt but what a parochial school (applicant's) is operated primarily for religious purposes, and coupled with the undisputable fact that they are not only 'operated, supervised, [or] controlled' by the Roman Catholic Church, but are also 'principally supported' by the church, clearly brings them within the

requirements of this alternative exemption provision."

On appeal by the Employment Division the Oregon Court of Appeals in Employ. Div. v. Archdiocese, 42 Or App 421 (1979) affirmed the referee's decision holding the services performed in the Archdiocese schools were exempt under ORS 657.072(1)(a)(B), but felt it unnecessary to consider whether such services were also exempt under the provisions of (1)(a)(A) of ORS 657.072. There was no petition for judicial review taken from the Court's decision.

As found herein (stipulated finding of fact No. 2), the Employment Division's issuance of the Notice of Determination finding applicant to be an employer subject to the Employment Division Law as of April 26, 1985, was based upon its belief that the Oregon

Supreme Court's later decision in Salem College mandates that services performed in religious schools including applicant's is not excluded from "employment" under Chapter 657 ORS regardless of the nature of the employer.

The doctrine of res judicata provides that a judgment is conclusive as to all matters (causes of action) which are litigated or which may have been litigated in a prior action. Collateral estoppel bars relitigation of issues previously determined between the same parties upon a different cause of action. In Oregon City Fed of Teachers v. O.C.E.A., 36 Or App 27, 584 P2d 303 (1978), the Court said:

"6. The judicial rules of res judicata are not transferrable in every respect to administrative

procedure. Generally, they are applicable where prompt, orderly problem resolution is desirable, but not where the procedure or subject matter by their nature suggest a need for greater flexibility. Professor Davis says: 'As a matter of principle, it is completely clear that the reasons behind the doctrine of res judicata as developed in the court system are fully applicable to some administrative proceedings. The reasons against a second litigation between the same parties of the same claims or issues are precisely the same for some administrative determinations. The sound view is therefore to use the doctrine of res judicata when the reasons for it are present in full force, to modify it

when modification is needed, and to reject it when the reasons against it outweigh those in its favor.' [Footnote omitted; original emphasis] K. Davis, Administrative Law Treatise, 548, para. 18.02 (1958)." 36 Or App at 35.

Although the facts in the instant matter are similar to or identical with the facts of the first proceeding that involved the applicant in 1979, and there has been no intervening change in the law, there have been subsequent judicial decisions entered, i.e., the Salem College case. That case interpreted the law differently to the extent that the Oregon Court of Appeals and Supreme Court in their decisions held ORS 657.072(1)(a)(B) to be unconstitutional. Since the Courts have again interpreted the law, the doctrine

of res adjudicata should be rejected, as the reasons against it outweigh those in favor of it. To decide otherwise would be to prevent the Employment Division from considering the dictates of a higher Court's decision.

ORS 657.072(1)(a) states: "'Employment' does not include service performed: (a) In the employ of: (A) A church or convention or association of churches; (B) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches * * *".

The Employment Division contends that the statute [ORS 657.072(1)(a)] has been held to be unconstitutional by the Oregon Supreme Court in the case of Salem College and Academy v. Employment

Div., 298 Or 471, 695 P2d 25 (1985), and is, therefore, no longer effective.

As stipulated by the parties: "The primary purpose of the Archdiocese is to promote and spread the Roman Catholic religion in the western part of Oregon. The general purposes of the Archdiocese include the following: to establish and conduct schools, seminaries and colleges, and to carry on benevolent, charitable, religious and missionary work of the Roman Catholic church in the western part of Oregon." That applicant's schools have been "created and operated primarily for religious purposes" has not been questioned. As shown herein, applicant's parochial schools are no intertwined within the structure of the Roman Catholic church as to be an inseparable part thereof. Clearly, applicant is a "church" within

the meaning of ORS 657.072(1)(A) and Oregon Administrative Rules Chapter 471-31-090(1)(a) and it cannot be found that its parochial schools are any the less so.

As found herein, the Archdiocese is controlled by an Archbishop who is appointed by the Pope who is the spiritual leader of the Roman Catholic church. The Archdiocese is made up of local parishes, each of which consists of a Roman Catholic church and its members. The Archdiocese operates the schools through its local parishes and religious orders. The schools of the Archdiocese are themselves a part thereof, operated primarily for religious purposes, and have no separate legal existence of their own. The inescapable conclusion is that subjecting the services of the parish

school staff to the Employment Division Law would be akin to subjecting the Roman Catholic church itself to the law.

Unlike some church sponsored endeavors, services performed for a school are not in the furtherance of a trade or business for profit for the school or applicant. Any such business endeavor would, of course, to the extent thereof, subject applicant to the requirements of the Employment Division Law.

Even if applicant's schools were not considered a part of applicant's corporate structure as not coming within the meaning of the word "church" there is no doubt but what an exemption from the Employment Division Law would still be afforded applicant under the provisions of (1)(a)(B) of ORS 657.072. As the record amply demonstrates in this

matter, there is no doubt but what applicant's parochial schools are operated primarily for religious purposes and, coupled with the indisputable fact that they are not only "operated, supervised, (or) controlled" by the church clearly brings them within the requirements of this alternative exemption provision. If one is inclined to disagree, the Court of Appeals in Emp. Division v. Archdiocese of Portland in Oregon, 42 Or App 421, 600 P2d 926 (1979), found: "* * * there was substantial evidence that all of the parochial schools are subject to the actual control of the Archdiocese. Moreover, * * * there was also substantial evidence to support a finding that the schools are subject to the direct legal control of the Archdiocese and its parishes * * *".

Archdiocese 42 Or App at 425. The control, both actual and direct legal control, of the Archdiocese and its parishes has not diminished since the court entered its decision in 1979.

As indicated herein, the Employment Division has taken the position that the Oregon Supreme Court has decided in Salem College that religious schools must be covered by the Employment Division Law. It goes so far as to include all schools, whether religious or not, even if operated and supported by a church. The Division's position is succinctly stated in its Hearing Memorandum filed July 30, 1987, in which it was pointed out: "Contrary to Applicants' contentions that Salem College and Academy does not mandate coverage of church employes, to the extent that any person [who] is employed

by a church operated school, that is precisely what was mandated by the case. The Court held that ORS 657.072 does not exempt all religious schools and their employes from coverage i.e., all religious schools and their employes are subject to taxation under Employment Division law. Distinguishing among religious schools because they are part of a church would violate the Oregon Constitution. The Employment Division has no alternative but to impose taxes on all religious schools."

Salem College & Academy, Inc. was a case that grew out of a tax assessment against the Academy. The Academy requested a hearing on the assessment, claiming that it was exempt from reimbursement for Unemployment Insurance benefits under ORS 657.072(1), or that the statute was unconstitutional. A

referee decision found the Academy was not exempt under the statute and affirmed the assessment. On appeal, the Oregon Court of Appeals found the statute infringed on the constitutional establishment of religion clause and reversed the referee's decision. Salem College & Academy, Inc., v. Emp. Div., 61 Or App 616, 659 P2d 415 (1983). On review, the Oregon Supreme Court reversed the Court of Appeals and reinstated the Employment Division's decision, but also finding the statute to be unconstitutional.

Although Salem Academy contended it was excluded from the provisions of the Employment Division Law as coming within the exclusion of ORS 657.072(1)(a)(B), the referee decision found otherwise. Although it was agreed that the Academy comes within that part of the statutory

requirements that it was: "An organization which is operated primarily for religious purposes", it could not be found that it was also "operated, supervised, controlled or principally supported by a church or convention or association of churches."

Clearly, Salem Academy was not a church, nor was it operated or supported by a church. It was not associated with a church, nor was it a church, as applicant Archdiocese of Portland in Oregon has been found to be. As shown by applicant, Salem Academy, as decided by the Oregon Supreme Court, it not the same as nor controlling in the case of applicant's exclusion from the Employment Division Law. Although the Supreme Court found the statute to be unconstitutional, a position originally argued by Salem Academy, yet it upheld

the referee decision that found the Academy not to come within the requirements of the statute.

As suggested in Salem Academy:

"The present case would avoid constitutional difficulties if [the school] qualified for exemption as a church or as 'principally supported' by one or more churches. If ORS 657.072(1)(a) could be so interpreted and applied, it should be. Statutes should be interpreted and administered to be consistent with constitutional standards before attributing a policy of doubtful constitutionality to the political policymakers, unless their expressed intentions leave no room for doubt." 298 Or at 481. (Citations omitted).

Thus, in the case of Archdiocese, it is seen that the courts requisite for

the interpretation of the statute and application of the exclusion is present.

Salem Academy did not consider the constitutional protections to be afforded a church, such as applicant, which has doctrinal objections to being made subject to the Employment Division Law. The instant matter involves the express intention of the Legislature to exclude churches and a long standing practice of honoring that exemption even for church employes who work therein and in organizations operated primarily for religious purposes. Church employes are not to be treated like public school employes. The statute clearly provides several alternative exemptions by the very nature of its disjunctive language. The first exemption, which is disjointed from the second exemption, provides that, "'Employment' does not include

service performed; (a) In the employ of: (A) A church of convention or association of churches". Thus, from the clear unambiguous statutory language it is seen that service performed in the employ of a church regardless of the nature of such service constitutes exempt employment. Had it been intended that such service must also be primarily religious in nature, such additional restriction would have been included. It is uncontroverted that Archdiocese schools are an integral and inseparable arm of the Roman Catholic Church. The statute designating those types of employment relationships that are not subject to coverage in the instant matter clearly exempts the employment relationships of the staff members of applicant's church schools.

It is concluded from the record in

this matter that services performed for applicant by its employes come within the exclusions of ORS 657.072(1)(a)(A) as being for "a church" and/or ORS 657.072(1)(a)(B) as being for "An organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church", and that such services are not subject to the Employment Division Law. There is, of course, no question but what applicant is a "nonprofit employing unit", as qualified by subsection (2) of ORS 657.072 and that it is exempt from income tax under section 501(a) of the U.S. Internal Revenue Code. Therefore, applicant is not to be considered an employer within the meaning of nor subject to the Employment Division Law on or after April 26, 1985.

DECISION

The determination notice which was served March 31, 1986, is set aside.

/s/ _____

Glen E. Seidler

Referee

ORDER OF THE COURT OF APPEALS OF THE STATE OF OREGON DENYING RECONSIDERATION

In the Matter of

the Notices of Determination of

Archdiocese of Portland and Diocese of Baker.

ARCHDIOCESE OF PORTLAND

IN OREGON,

Diocese of Baker in Oregon,

Petitioners,

v.

EMPLOYMENT DIVISION,

Respondent.

(86-T-0081, 86-T-0111;

CA A67153 (Control), A67166)

Entered October 9, 1991

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has on October 9, 1991, denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant review. The Appellate Court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

/s/ George M. Joseph

Chief Judge

ORDER OF THE SUPREME COURT OF THE STATE OF OREGON DENYING REVIEW

In the Matter of

the notices of Determination of

Archdiocese of Portland and Diocese of Baker.

ARCHDIOCESE OF PORTLAND

IN OREGON,

Diocese of Baker in Oregon,

Petitioners,

v.

EMPLOYMENT DIVISION,

Respondent.

(86-T-0081, 86-T-0111;

CA A 67153 (Control, A67166,

SC 538524)

Entered: November 26, 1991

The Court has considered the petition for review and orders that it be denied.

DATE: November 26, 1991.

/s/ _____

Wallace P. Carson, Jr.

Chief Justice

Van Hoomissen, J., would allow

PETITIONER ARCHDIOCESE'S APRIL 7, 1986, REQUEST FOR HEARING ON NOTICE OF DETERMINATION, IN PERTINENT PART PROVIDED:

* * * *

Furthermore, a determination that the Archdiocese of Portland in Oregon is an "employer" subject to ORS Chapter 657 is violative of the Establishment of Religion Clause of the U.S. Constitution (First and Fourteenth Amendments) as well as violative of the prohibitions against discrimination among religions found in Article I of the Oregon Constitution (Sections 2, 3 and 5.)

PETITIONER DIOCESE'S MAY 15, 1986, REQUEST FOR HEARING ON NOTICE OF DETERMINATION, IN PERTINENT PART PROVIDED:

Furthermore, a determination that the Diocese of Baker is an "employer"

subject to ORS Chapter 657 is violative of the Establishment of Religion Clause of the U.S. Constitution (First and Fourteenth Amendments) as well as violative of the prohibition against discrimination among religions found in Article I of the Oregon Constitution (Sections 2, 3 and 5.)

PETITIONER ARCHDIOCESE'S JANUARY 25, 1990 BRIEF ON THE MERITS TO THE COURT OF APPEALS OF THE STATE OF OREGON, AT PAGE 1, PRESENTED THE FOLLOWING QUESTION TO THE COURT:

Does the Establishment Clause and the Oregon Constitution prohibit subjecting churches, such as the [Archdiocese], to the Employment Division Law?

PETITIONERS' MARCH 6, 1991, BRIEF ON THE MERITS TO THE COURT OF APPEALS OF THE STATE OF OREGON, AT PAGE 2, PRESENTED THE FOLLOWING QUESTION TO THE

COURT:

Does the Constitution of Oregon or the United States Constitution prohibit [Petitioners], as churches, from being treated as subject Employers under the Employment Division Law?

ORS 657.176(1) and (2):

Grounds and procedure for disqualification. (1) An authorized representative designated by the assistant director shall promptly examine each claim to determine whether an individual is subject to disqualification as a result of a separation, termination, leaving, resignation, or disciplinary suspension from work or as a result of failure to apply for or accept work and shall promptly enter an assistant director's decision if required by ORS 657.265(4).

(2) An individual shall be

disqualified from the receipt of benefits until the individual has performed service in employment subject to this chapter, or for an employing unit in this or any other state or Canada or as an employee of the Federal Government, for which remuneration is received which equals or exceeds four times the individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred, if the authorized representative designated by the assistant director finds that the individual:

(a) Has been discharged for misconduct connected with work, or

(b) Has been suspended from work for misconduct connected with work, or

(c) Voluntarily left work without good cause, or

(d) Failed without good cause to apply for available suitable work when referred by the employment office or the assistant director, or

(e) Failed without good cause to accept suitable work when offered.

ORS 657.471(1) and 7(a):

Manner of charging benefits to employer. (1) Subject to the provisions of subsections (2) to (7) and (10) of this section, benefits paid to an eligible individual shall be charged to each of the individual's employer to the individual during the base year bear to the wages paid by all employers to that individual during that year.

* * * *

(7) If a base-year employer, not otherwise eligible for relief of charges for benefits under this section, receives notification of an initial

valid determination of a claim filed by an individual who:

(a) Left work of such employer voluntarily and not attributable to the employer, such employer may request relief of charges within 20 days after the mailing of such notice thereof to the employer's last address as shown by the records of the assistant director. The request must advise the assistant director in writing the date of such leaving and that such leaving was voluntary and not attributable to the employer and the reason therefor. Upon receipt of such notice from the employer the assistant director shall investigate the separation and if the resulting determination, which shall be made by the assistant director, establishes that the leaving was voluntary and not attributable to the employer, that

employer's account shall not be charged with benefits during that individual's benefit year. If the individual was reemployed by such employer prior to the filing of the initial valid claim, the employer shall not receive relief of the employer's account under this subsection; or

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